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MBF HOLDINGS BHD & ANOR

v.

DEUTSCHE BANK (MALAYSIA) BHD & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D3-22-398-2008]
31 MAY 2012

C ***CONTRACT:*** *Execution - Agreement signed by plaintiffs but not by defendant - Whether a concluded contract - Whether enforceable - Whether specific performance available - Contracts Act 1950, s. 2(h)*

D ***CONTRACT:*** *Specific performance - Absence of concluded contract - Agreement signed by plaintiffs but not by defendant - Whether specific performance available - Specific Relief Act 1950*

The plaintiffs claimed in relation to a subscription agreement which was signed by the plaintiffs but not by the 1st defendant. The plaintiffs prayed for specific performance of the subscription E agreement and further and/or alternatively, damages for breach of contract. The central issue in this case was whether the subscription agreement signed by the plaintiffs but not by the 1st defendant stood as a concluded contract entitling the plaintiffs to the reliefs sought.

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Held (dismissing the plaintiffs' claim):

(1) As a general rule, for a contract to be enforceable, the parties to a contract must have duly executed the same. There are a number of exceptions to the general rule, for example, oral G contracts. There are also a number of cases where the court has deemed that the agreements have been concluded. (para 11)

(2) The Contracts Act 1950 ("CA 1950") makes a distinction H between agreement and contract. Section 2(h) of CA 1950 asserts that an agreement enforceable at law is a contract. The plaintiffs' assertion that there was a contract in the pleadings did not subscribe to the spirit and intent of CA 1950. In addition the plaintiffs' prayers to seek specific performance of I the inchoate subscription agreement did not fall within the

spirit and intent of the Specific Relief Act 1950 ("SRA 1950"). Firstly, the subscription agreement as it stood was not a contract as both parties had not signed it. To seek relief under SRA 1950 it must be a contract whether it is written or oral and an inchoate agreement will not stand as a contract. (para 11)

(3) In the instant case, there was no concluded contract as alleged by the plaintiff. (para 11)

Case(s) referred to:
Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***
Ho Kam Phaw v. Fam Sin Nin [2000] 3 CLJ 1 FC ***(refd)***
Prima Juara Corporation Sdn Bhd v. Agro Bank [2011] 1 LNS 373 HC ***(refd)***
Sri Kajang Rock Products Sdn Bhd v. Mayban Finance Bhd & Ors [1992] 1 CLJ 204; [1992] 3 CLJ (Rep) 611 HC ***(refd)***
Total Gas Marketing Ltd v. Arco British Ltd & Ors [1998] 2 Lloyds LR 209 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 2
Contracts Act 1950, s. 2(h)
Specific Relief Act 1950, s. 3(a)

For the plaintiffs - Vasanthi (Asfarlah with her); M/s Vas & Co
For the 1st defendant - Logan Sabapathy (Bhuvenesvary with him); M/s Logan Sabapathy & Co

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the plaintiffs' claim in relation to a subscription agreement which was signed by the plaintiffs but not the 1st defendant. The prayers in the statement of claim read as follows:

Wherefore the plaintiffs claim:

(a) specific performance of the Subscription Agreement and Mandate Letter;

(b) further and/or in the alternative, damages for breach of contract;

(c) damages for misrepresentation;

(d) special damages of RM1,000,000.00;

(e) interest on all sums ordered to be paid at the rate and for a period to be determined by this Honourable Court;

(f) costs.

[2] The central issue in this case is whether the subscription agreement signed by the plaintiffs, not the 1st defendant will stand as a concluded contract entitling the plaintiffs to the reliefs sought.

[3] It must be noted that the plaintiffs rely on a purported statement by one Raja Ali of the defendant that the credit approval was in place to enable the 1st defendant to execute the agreement. The 1st defendant's position is that such statement was not made and credit approval was not in place. The learned counsel for the 1st defendant has prepared encl. 47 captioned as 'Factual Analysis From Documents' to show the sequence of event at the relevant dates to justify that there was no concluded agreement as alleged by the plaintiffs.

[4] The cases, parties have relied on, are set out in the annexure to the judgment.

Brief Facts

[5] The brief summary of the case filed by the parties in encls. 38 and 39 adequately explain the subject matter of the dispute. Much judicial time will be saved if the said enclosures, *inter alia*, are repeated. Enclosure 38 of the plaintiff can be summarised as follows:

(a) The 1st plaintiff is a public company incorporated under the Companies Act 1965 (CA 1965) and its shares are quoted and listed on the Bursa Malaysia. The 2nd plaintiff is a private company incorporated under CA 1965 and is a wholly owned subsidiary of the 1st plaintiff.

(b) On the advice of Aseambankers premised on the subprime crisis which started in the United States in August 2007, the plaintiffs sought out underwriters for their notes programme and to arrange a bridge facility while the asset backed securitisation structure (ABS) secured on MBF Cards' credit card receivables were being established.

(c) The plaintiffs' dealings with the 1st defendant were in fact brought about by the subprime issue causing a credit squeeze among investors. The defendants were made aware of the large roll-overs in respect of the notes and new notes anticipated from December 2007 to February 2008 and the adverse effects of the failure of any roll-overs.

(d) The plaintiffs appointed the 1st defendant on an exclusive basis as lead manager and arranger to arrange the issuance of ABS on a portfolio of MBF Cards' credit card receivables, and while the ABS was being put in place, the 1st defendant was to provide the 2nd plaintiff with a line of credit or bridge facility of up to RM600 million, a warehousing facility of up to RM150 million until the sale of credit card receivables to a special purpose vehicle, ie, the ABS.

(e) The defendants sought internal credit approval for the bridge facility and engaged with the plaintiffs' legal advisers and accountants to develop a structure to meet the plaintiffs' requirements, with the plaintiffs' heads of department to review presentation materials and responses to the relevant authorities and engaged with RAM and Securities Commission to determine and secure their concurrence on the specific parameters of the ABS. Parties agreed upon financing terms or the term sheet whereupon phase 1 under the mandate letter was completed;

(f) The parties and their respective solicitors thereafter finalised the structure and documentation of the transaction in accordance with the term sheet under phase 11 of the mandate letter;

(g) On 1 November 2007, Raja Ali confirmed that credit approval was in place. Coupled with there being no adverse report from RAM and Securities Commission, Raja Ali informed the

plaintiffs that issuance of the notes and execution of the subscription agreement could be carried out. With this, the identity and obligations of the contracting parties, subject matter and mechanics of the transaction, approval of the bridge facility and consideration were all definitively and conclusively agreed upon.

(h) On 2 November 2007, Raja Ali reiterated and urged parties to proceed with execution of the subscription agreement. After an e-mail from the 1st defendant's Galveender Kaur (copied to relevant individuals) acknowledging the need for execution within the day, some minor amendments were incorporated. Thereafter the 1st defendant's solicitors *vide* e-mail of 2 November 2007 enclosed a clean copy of the subscription agreement to the plaintiffs' solicitors, which was executed under seal for the 2nd plaintiff by Tan Sri Mogan on 2 November 2007.

(i) Executed copies of the subscription agreement were forwarded to the 1st defendant on 5 November 2007 after which a further issue of increased security cover was raised and resolved *vide* a variation letter to be executed by Thomas on behalf of the 2nd plaintiff given the formalised subscription agreement. Raja Ali and Barry confirmed that there were no other issues.

(j) By a letter dated 12 November 2007 from Raymond Yeoh and Raja Ali, the 1st defendant stated that their credit department had imposed conditions on them with regards to credit approval which they were unable to meet. The 1st defendant urged the plaintiffs to consider three options namely: abandonment of the financing and progressing the ABS; identifying other investors to underwrite the 1st defendant's own exposure under the financing or abandoning the transaction entirely.

(k) On 14 November 2007, the plaintiffs were informed that as the credit approval terms were too onerous on the defendants' team in Singapore, they could not proceed as agreed and that they were looking to do a 'back to back backstop' with their investors to meet the obligations under the subscription agreement and had identified and engaged in negotiations with

two foreign investors. Tan Sri Mogan reiterated that there was a concluded agreement and the condition imposed post contract was an internal issue for the defendants to resolve.

(l) On 26 November 2007, the plaintiffs informed the defendants that there was a concluded contract between the parties formalised and evidenced in the subscription agreement. Accordingly, the plaintiffs effected payment of the initial subscription fee of RM2.7 million to the 1st defendant.

(m) On 29 November 2007, the 1st defendant purported to refute the fact relying on cl. 7 of the mandate letter that any obligation on their part would be subject to necessary internal approvals and execution of mutually satisfactory documents and compliance therewith. The initial subscription fee of RM2.7 million was returned by the defendants without the agreement.

[6] Brief facts of the 1st defendant's case encl. 39 can be summarised as follows:

(a) The 2nd plaintiff is a wholly-owned subsidiary of the 1st plaintiff whilst the 1st defendant is a banking entity incorporated within the jurisdiction under the Banking and Financial Institutions Act 1989.

(b) The 2nd plaintiff, in relation to its credit card business, had an existing funding program involving the issuance of the commercial paper and medium term notes to be subscribed by investors from the capital markets (Existing Funding Program).

(c) In September 2007, the 1st plaintiff and the 1st defendant engaged in discussion on exploring the possibility of migrating the Existing Funding Program to a long term capital markets financing by way of ABS.

(d) After negotiations, the 1st plaintiff and the 1st defendant formalised their relationship through what had been described as the mandate letter dated 8 October 2007 executed between the 1st plaintiff and the 1st defendant.

(e) From Appendix 1 to the mandate letter, there were various steps envisaged to be explored in the proposal towards the ABS. This included what was described as a Line of Credit of RM300,000,000 towards the overall ABS.

(f) Section 2 of the mandate letter made provision for exclusivity of engagement upon terms therein set out with the following qualifications in the said s. 2.

(g) The evidence will establish that there was never any amendment or modification of the mandate letter in terms contractually envisaged by the parties.

(h) The evidence will also establish that there was never any subsequent separate documentation executed by the 1st defendant committing to any agreement to fund.

(i) The evidence will also establish that as at 7 November 2007, the proposed terms explored by the parties was still awaiting internal credit approval to the knowledge of the 1st plaintiff.

(j) After the evening of 7 November 2007, the evidence will further establish that the 1st plaintiff then became aware that internal credit approval had not been obtained on the proposed terms explored by the parties.

(k) The evidence will also show that a case of alleged concluded contract on 2 November 2007 and/or 5 November 2007 was thereafter only then asserted by the plaintiffs.

(l) Apart from that case being shown to be evidentially contrived, that alleged case of the plaintiffs is also legally unsustainable given the agreed contractual framework.

[7] The statement of agreed facts encl. 41 reads as follows:

(a) The 1st plaintiff and the 1st defendant executed the mandate letter dated 8 October 2007 upon the terms and conditions therein set out.

(b) On 5 November 2007, the 1st plaintiff delivered to the 1st defendant the subscription agreement executed only by the 1st plaintiff.

(c) The 1st defendant *vide* their letter dated 12 November 2007 informed the plaintiffs that they did not execute the subscription agreement.

(d) On 26 November 2007 and 27 November 2007, the 1st plaintiff wrote to the 1st defendant to, *inter alia*, tender payment of the subscription fee.

(e) On 27 November 2007 and 29 November 2007, the 1st defendant responded to the plaintiffs' said letters and returned the said tendered payment.

(f) On 30 November 2007, the 1st plaintiff, *inter alia*, stated that they were placing the matter in the hands of their solicitors.

(g) On 28 March 2008, the plaintiffs' solicitors served the unsealed writ of summons and statement of claim on the 1st defendant's solicitors.

(h) On 1 April 2011, the High Court set aside the *ex parte* order of court respecting the proceedings against the 2nd defendant (the decision of the High Court was affirmed by the order of the Court of Appeal made on 25 November 2012 in the plaintiffs' civil appeal no. W-02(IM)-1189-2011).

Preliminaries

[8] Five witnesses gave evidence for the plaintiffs and three witnesses gave evidence for the 1st defendant. The plaintiffs' evidence heavily relied on what was said by Raja Ali but was not supported by documentary evidence. The evidence of the 1st defendant's witnesses was consistent with the documentary evidence to demonstrate that internal approval was not in place at the material time. The evidence of the plaintiffs in respect of quantum lacked credibility as well as consistency.

[9] What is important to note from the evidence is that: (i) the plaintiffs needed the facility and the 1st defendant was keen to provide the facilities subject to terms and conditions and very importantly subject to internal approval; (ii) the signatories of the 1st defendant was not in a position to execute the agreement and they have no issue if the plaintiffs proceeded to execute the agreement. The evidence of DW2, Mr Barry, was consistent and precise on this issue and there was no mincing of words despite severe cross-examination. And that part of the evidence, *inter alia*, is reproduced in encl. 45 of the plaintiffs' submission and reads as follows:

PC: Can you please look at page 387 enclosure 34. Have you read the e-mail?

DW2: Yes.

PC: Now, in the e-mail it is clearly stated that a fair copy is to be sent to the Plaintiffs for their execution.

DW2: Yes, that is what they wanted.

PC: My question is, why didn't you send a reply that the fair copy should not be sent out because the internal credit approval was not obtained as of that date?

DW2: I had that discussion with Ms Susan previously but she wanted (Counsel Interrupts)

PC: My question is why you didn't send an e-mail in reply to this e-mail?

DW2: Because that would not have been true.

PC: Pardon?

DW2: I had no objection to sending it to the clients for their signature.

PC: You didn't mind the agreement being signed even though you knew internal credit approval was not obtained?

DW2: I did not mind for our client to sign even though our approvals had not been obtained. I only minded us signing.

PC: Did you say that in any of the e-mails that you had no problem with the clients signing but you were not ready for Deutsche Bank to sign?

DW2: Unfortunately, the only e-mail that says that is the one that we sent to Deutsche Bank's staff.

PC: But you did not cc it to any of the Plaintiff's representatives?

DW2: Unfortunately No. I wish I had. We wouldn't be here today.

PC: After this matter was terminated by the Plaintiffs, did you disclose this information in any letters to the Plaintiffs? A

DW2: No. we had so many phone conversations. I did not feel it was necessary.

[10] In this respect, the submission of the learned counsel for the 1st defendant in encl. 46 para. 84 has merits and is supported by evidence. The said paragraph reads as follows: B

> The overall evidence points to no urgency right until 2.11.2007 with the only triggering event for the rush of 2.11.2007 was to accommodate the travel arrangements of the Plaintiffs' signatory. This supports the 1st Defendant's position that the events of 2.11.2007 had nothing to do with internal credit approval being in place but purely to accommodate the travel arrangements of the Plaintiffs' signatory. C D

[11] I have heard the evidence, read the documents and submission of the parties in detail. The learned counsels have placed a comprehensive submission of the facts, law, contradictions and issues relating to pleadings documents etc. The court is grateful. It will serve no useful purpose to repeat the same save to deal with the core issues. After having given much consideration to the submission of the learned counsel for the plaintiffs, I take the view that the plaintiffs' claim must be dismissed. My reasons, *inter alia*, are as follows: E F

(a) As a general rule, for a contract to be enforceable the parties to a contract must have duly executed the same. There are a number of exceptions to the general rule, for example, oral contracts. There are also a number of cases where the court has deemed that the agreements have been concluded. For example: G

(i) In *Sri Kajang Rock Products Sdn Bhd v. Mayban Finance Bhd & Ors* [1992] 1 CLJ 204; [1992] 3 CLJ (Rep) 611, VC George J (as he then was) explained the meaning of the word 'contract' in these words: H

> To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that is there must be a *consensus ad idem*; those parties must intend to create legal relations in the sense that the promises of each side are to be I

> enforceable simply because they are contractual promises and as clear and helpful an enunciation of the principles as any which should guide the court in determining the ever recurring question of whether there has been a contract between the parties ...

(ii) In *Ho Kam Phaw v. Fam Sin Nin* [2000] 3 CLJ 1, the Federal Court had to consider whether there was in existence a contract when only drafts were exchanged. The Federal Court held that:

> From the evidence that showed that Fam was ready to execute the first draft and therefore when the signed copies of the third draft were sent by Ho's solicitors to Fam's solicitors, there was already a concluded agreement.

(iii) In *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133, a case where the primary issue was whether there was a concluded contract between parties, Edgar Joseph Jr SCJ (as he then was) made the following observations:

> 'The existence of an agreement depends upon the intention of the 'parties' and that for there to be an agreement, the parties must be *ad idem* ie must be a consensus between them ... authorities show that such inference must be drawn. It may be inferred from the language used, the parties' conduct having regard to the surrounding circumstances and the object of the contract.

In all the above cases, the peculiar facts and positive decisions of the person who will execute the agreement or executed the agreement has played a crucial role for the court to deal with the issue of whether a valid and enforceable agreement is in place in contrast to a situation where discussions are still ongoing through the agents or employees or intermediaries or related persons as the instant case will show.

(iv) There are also a number of authorities to suggest that where there are condition precedents to be met before the agreement can be executed or be enforced the court is reluctant to force the parties to submit to the terms of the agreement (see *Total Gas Marketing Ltd v. Arco British Ltd & Ors* [1998] 2 Lloyds LR 209).

(v) In *Prima Juara Corporation Sdn Bhd v. Agro Bank* [2011] 1 LNS 373, I have the following observations:

> In my view, clause 29(d) of the said letter of offer is binding on the parties. In consequence the purported mutual agreement which is not evidenced in writing between the parties does not create any legal obligation. Further, the said letter of offer must only be seen as a letter of offer and is subject to all conditions stated therein which has not been materialised and the loan documents has not been executed. In consequence the claim for damages in my view is too remote. In addition the claim and evidence in respect of damages are self serving statements and no probative value can be attached to a trumpeted claim of ½ a billion ringgit or more in relation to a loan of less than 50 million ringgit – the evidence lacks credibility. In addition there is no evidence of mitigation …

(b) It is essential to note that our Contracts Act 1950 ("CA 1950") makes a distinction between agreement and contract. Section 2(h) of CA 1950 asserts that an agreement enforceable at law is a contract. The plaintiffs' assertion that there is a contract in the pleadings does not subscribe to the spirit and intent of CA 1950. In addition the plaintiffs' prayers to seek specific performance of the inchoate subscription agreement do not fall within the spirit and intent of the Specific Relief Act 1950 ("SRA 1950"). First the subscription agreement as it stands is not a contract as both parties have not signed it. To seek relief under SRA 1950 it must be a contract whether it is written or oral and an inchoate agreement will not stand as a contract as s. 3(a) of SRA 1950 specifically states:

> **3. Savings.**
>
> Except where it is herein otherwise expressly provided, nothing in this Act shall be deemed -
>
> (a) to give any right to relief in respect of any agreement which is not a contract;

(c) In the instant case, it is my finding that there is no concluded contract as alleged by the plaintiff and I accept the submission of the learned counsel for the 1st defendant on this issue.

A (d) On other issues raised by the plaintiff, I find no merits inclusive of the evidence as to quantum which has been adequately taken in the submission by the 1st defendant.

[12] For reasons stated above, the plaintiffs' action is dismissed B with costs. The plaintiffs to pay the 1st defendant costs in the sum of RM100,000. The 1st defendant to pay the allocatur fees before the extraction of order for costs, and the deputy registrar to issue certificate for the allocatur.

C I hereby order so.

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